Law Quadrangle (formerly Law Quad Notes)

Volume 26 | Number 2 Article 16

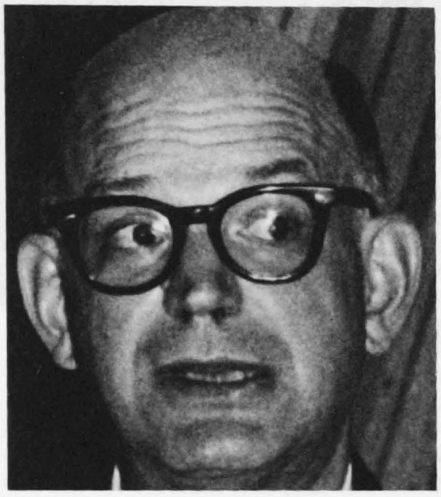
Winter 1982

Anittrust: Economic Regulation or Deregulator?

Thomas E. Kauper
University of Michigan Law School

Antitrust: Economic Regulation or Deregulator?

Professor Thomas E. Kauper
University of Michigan Law School



Summary:

Current controversy over antitrust centers on goals and methods. "Chicago School" economic analysts seek an antitrust policy predicated solely upon concerns of economic efficiency. Others seek to maintain a policy intended also to protect political and social values. Disagreements over methodology focus on the Chicago School's primary reliance on economic price theory to determine economic efficiency.

Supreme Court decisions reflect these changing philosophies about the goal of antitrust. Recent decisions relying on economic analysis curtail or overrule earlier decisions, particularly those of the Warren Court. While those "rested in part on concepts of property and contracts, ideas derived from other parts of the legal system, today's decisions speak in terms better understood by economists." The philosophical incompatibility of the various opinions from which specific rules are derived has created confusion. Furthermore, not all recent decisions are based on economic premises. "The Court has reshaped doctrine based on economic analysis only where there is broad consensus among economists."

Complexity and inconsistency can also result from the tension between current antitrust doctrine and the political response it has evoked. These legislative efforts are "predicated in large part on a concern over non-economic values and directed primarily at antitrust doctrine which is moving in the opposite direction."

Common themes underlie all this current controversy: antitrust has penalized efficiency; compliance has become unduly complex and costly. These criticisms resemble those directed at other forms of economic regulation. This becomes understandable when the paradoxical relationship between antitrust and other economic regulation is recognized.

Although "direct economic regulation and antitrust may be viewed as alternatives," they have developed in an interrelated fashion, and antitrust has taken on many of the characteristics of economic regulation. "Particularly in the period following 1930, it has been shaped in an increasingly regulatory fashion and has contributed significantly to the legalization of American society."

Although antitrust is substantively, procedurally and institutionally different from direct economic regulation, it "rests on the same broad premise, namely, that government must intervene when markets fail to work properly." While early antitrust rules were proscriptive, the proliferation of antitrust statutes and widening span of their bans has so narrowed the range of permissible activities that "antitrust has become increasingly prescriptive in practical effect," as has economic regulation. Insulation from the political process has characterized both antitrust doctrine, which was largely shaped in the courts, and economic regulation controlled by particular agencies.

A variety of factors have dictated these similarities between economic regulation and antitrust. One is the expansion of the scope of each in the attempt to serve more ends.

The belief that government process could and should do better than competitive markets at protecting noneconomic values developed during the depression and is reflected in the Supreme Court decisions of the Warren era. "Such decisions can be perceived as a form of economic regulation," consciously imposing costs on business entities to provide a cost protection to others.

Antitrust may be thought to share the complexity characterizing economic regulation too. "But at least in comparative terms, antitrust rules are not complex." Uncertainty, rather than complexity, has been the traditional problem with antitrust. Yet the effects of this uncertainty have all been, ironically, to increase the regulatory effect of antitrust.

The availability of private, statutory remedy for those injured by antitrust violations distinguishes antitrust from other forms of economic regulation. The mandatory trebling of damages in these private cases can operate as an overdeterrent, keeping firms from aggressively but lawfully competing. "Firms hesitate to walk even close to the line of antitrust illegality."

The constant drive by business for more precise standards has moved antitrust doctrine and institutions into a more and more regulatory posture. Judicial opinions have also expressed concern about the lack of precision in antitrust standards, supporting the development of the sort of *per se* rules currently under attack as unduly regulatory. Uncertainty has also led firms to seek guidance from government enforcement agencies. Although these agencies lack the authority to render a binding opinion, firms tend to respond to their guidelines as though they were authoritative rulings.

While antitrust doctrine may be comparatively simple, its institutions and procedures are complex. An extraordinarily diverse group of actors are involved, and defendants may be subject to an array of remedies. Because antitrust doctrine is not a set of rules administered by a single agency but the result of thousands of court cases, it has been difficult to reevaluate and reform comprehensively.

Furthermore, removing or modifying the severity of particular rules cannot be effected through the litigation process. "Cases are brought to enforce rules, not to 'un-enforce' them."

The expansion of the reach of antitrust can be accounted for, in part, by factors common to all forms of economic regulation, factors like the growth of protectionist ideology and increased concern with income distribution. Yet antitrust has also grown because of its utility as a weapon to restrict economic regulation. The indirect challenge posed to state government regulatory actions by antitrust cases against those subject to such actions can be seen as one of antitrust's major accomplishments. Yet expansion of the scope of antitrust has been a consequence.

The final section of Professor Kauper's paper is exerpted here. In it he discusses the probable and desirable outcomes of the current demand for reevaluation of antitrust doctrine by the standard of economic efficiency.

Excerpt:

Antitrust is but one of a number of forms of regulation, economic and otherwise, which have contributed to the trend toward the legalization of business decision making. It has reflected the same shifts in values, and many of the procedural and institutional tendencies, characteristic of a variety of economic regulatory efforts. Taken for decades as an article of faith, a faith nurtured by a coterie of its own apostles, antitrust now finds itself under attack in the name of reason. As our economy has faltered, as we have lost ground to the forays of foreign competitors both abroad and at home, faith is being replaced by skepticism. Lawyers, the traditional guardians of antitrust, are being displaced by economists. The traditional modes of common law development are, in turn, giving way to cost-benefit analysis. . . .

The most fundamental issue for antitrust is, of course, the determination of ends. Current controversies in the courts, particularly with respect to vertical restraints and reflected in legislative debates over such issues as the proposed prohibition of large conglomerate mergers, are in reality debates over ends. These controversies over ends are directed toward the *substance* of antitrust rules.

. . . [T]he present orientation is toward an antitrust policy focused solely on concerns of economic efficiency. This will, of itself, cause some additional substantive change. At the same time, legislative responses to efficiency-oriented court decisions may go in precisely the opposite direction, placing emphasis on more populist-oriented concerns. It may well be that antitrust will be confined to the promotion of economic efficiency and that other rules, directed toward other ends and bearing some name other than antitrust, will also be enacted.

A more precise definition of goals will result, and indeed has resulted, in some doctrinal reformulation. Yet difficult substantive issues will remain, even if it is agreed that antitrust should concern itself only with economic efficiency. The efficiency effects of particular conduct must somehow be determined. In general terms, this seems to require employment of a cost-benefit analysis of the type so strenuously urged today for the assessment of all types of regulation. Such an analysis could, of course, be useful even if antitrust pursues noneconomic goals as a means of telling us what we are paying to achieve them. However, while antitrust, like other forms of regulation, ought not be comprised of rules which are in cost-benefit terms perverse, there are significant dangers in the insistence that all antitrust rules and cases be measured against a precise cost-benefit standard.

The costs at issue are elusive. Litigation and enforcement costs may perhaps be measured with some accuracy; but these are not the major elements of the cost side of the equation. The major concern is whether a given rule impairs efficiency and should therefore be abandoned. Efficiencies, however, are peculiarly difficult to identify and quantify. The same may be said on the benefit side, where the gain, if any, is in the promotion of allocative efficiency, the better employment of resources.

The attempt to measure costs and benefits in the setting of particular transactions is likely to be either impossible or, at a minimum, unreliable. The focus, then, is not on specific transactions but in the formulation of particular rules. For example, can we identify the costs and

benefits of price fixing generally and thus arrive at a rule dealing with price fixing? This is the approach of the Chicago School and a number of others as well. Through the use of price theory, it is possible to conclude at least that some conduct will in most cases impair allocative efficiency and confer no significant productive efficiency gains and should be prohibited. The reverse is true for some other types of conduct. With this methodology, relatively simple rules can be formulated and perverse results can be avoided.

The difficulty, of course, is that there are types of conduct for which no such simple rules can be formulated, where elaborate market, cost, price, and efficiency data must be evaluated. Moreover, even in generalized terms, economists may not agree on the consequences of particular conduct. If, as some have argued, antitrust rules should prohibit only conduct on the basis of economic consensus and cases should be brought only when a clear efficiency gain can be predicted, inaction is the prescribed course for a wide range of conduct.

There are justifications for such a course. If one is prepared to accept the contention that conduct which does not impair allocative efficiency through creation of monopoly power must necessarily be motivated by a predicted increase in productive efficiency, cost-benefit decisions are not difficult and seldom need be made on a case-by-case basis. Moreover, there is a plausible argument for a firm bias against judicial intervention except in clear cases, giving a preference to the decision of the firm actually in the market place unless *clearly* in the wrong. Judges, after all, suffer not only the infirmities of government decision makers generally but are confined to a litigation process which may make judgments about costs and benefits particularly difficult.

Yet inaction for a want of knowledge is troublesome indeed. Room must be left for intuitive judgments, or we are likely to see studies twenty years from now condemning failures to act on grounds that with hindsight seem clear. Errors which permit changes in industry structure are singularly difficult to correct. Moreover, in the current climate there is far more emphasis on costs in efficiency terms than on the benefits flowing from the elimination of monopoly power. The balance tends to be skewed.

The emphasis on the reformulation of substantive antitrust rules has tended to eclipse recognition of institutional and procedural changes which have occurred and consideration of such changes in the future. Yet these may be of at least equal import.

If antitrust is truly a matter of economic policy, there are significant consequences which may be expected to follow. The role of lawyers, and the use common law methodology, in the formulation of doctrine, has already been diminished, a tendency which is certain to continue. Economists may ultimately play the dominant role, a development which in turn may bring other institutional changes.

Traditionally, the Antitrust Division of the Department of Justice has characterized itself as a "law enforcement" agency. In bureaucratic terms, this has given the Division a degree of insulation from not only the most obvious forms of political interference but from the influence of other agencies, and the Congress, in policy terms. If all the Division does is "enforce the law," there is little basis for policy judgments and, thus, little basis for coordination of such judgments with others. But as the Division and the courts cast antitrust in economic policy terms, and as the Division utilizes a broad-based competition policy derived from the antitrust laws to enhance its deregulation efforts, its protective insulation may break down. Antitrust policies may ultimately need to be coordinated with monetary policy, and so on. It will, in short, be more difficult to assert that antitrust must reflect only competitive concerns, even though that is what Congress intended. The Division, then, must develop and rely on its own economic expertise if it is not to be subordinated to the views of others. Antitrust policy will remain its domain only if it possesses the greatest expertise in the development of such policy.

A similar impact may be felt by the courts. Economic policy decisions as such have seldom been left to the judiciary, which is outside the mainstream of political influence and accountability and utilizes a litigation process which may not be the most efficient or reliable means of determining economic "facts." At a minimum, the litigation process itself may need significant alteration if it is to adapt to the new emphasis on economic analysis in antitrust cases. . . .

Finally, a complete reassessment of antitrust sanctions is needed. The criminal, civil, and treble damage provisions of the antitrust statutes have been amended periodically, but not at the same time. The sanction structure needs to be considered as a whole, with particular emphasis on the treble damage remedy, which is virtually unique to antitrust. . . .

Central to these questions is the more basic question of whether we want to encourage private antitrust actions at all. . . . There are alternatives. A single civil penalty action brought by the government could replace both criminal and private damage remedies. Victims could be compensated from the fund, if such compensation is thought necessary. . . .

I began by declining to address the role of antitrust as a deregulator, a role which is perhaps its most important. It is relatively a limited role. Courts applying antitrust rules on a case-by-case basis cannot be expected to ignore clear antitrust exemptions, or dismantle existing, pervasive regulatory schemes. Within these confines, however, antitrust litigation can define the outer limits of economic regulation and confine antitrust exemptions to a relatively narrow scope. The effect of such litigation, moreover, may be to force legislative reconsideration of existing regulatory patterns and, in the process, to consider anew the possibility of relying more heavily on market forces as the ultimate regulator.

Antitrust, then, can be utilized to force legislative bodies to think anew about the utility of economic regulation. . . . Antitrust litigation is a crude way of provoking legislative action, but it has worked. It has also been successful as an educational device, providing a forum in which competition can be presented as a realistic alternative to regulation. In the long run, significant deregulation can come only through legislative action. Antitrust has a major role to play in forcing and informing such action—a role it can perform more effectively once its own house is in order.